

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, et al.
Plaintiffs,

vs.

TYSON FOODS, INC., et al.,
Defendants.

Case No. 4:05-CV-00329-TCK-SAJ

**MOTION TO QUASH SUBPOENAS
FOR DEPOSITION AND DOCUMENT PRODUCTION**

Comes now Randy Allen, by and through his undersigned counsel, and respectfully submits his Motion to Quash, or alternatively, Motion for Protective Order regarding the subpoenas issued on September 27, 2006, and requiring production of documents on October 9, 2006, and attendance for deposition on October 18, 2006, because said Subpoenas: (i) are oppressive, overly broad, and unduly burdensome; and (ii) seek the discovery of irrelevant information not reasonably calculated to lead to the discovery of admissible evidence. In accordance with Local Rule 37.1, counsel for Randy Allen and Plaintiff have conferred and have been unable to resolve this dispute.

I. INTRODUCTION

Randy Allen, who is not a party in this case, objects to these Subpoenas, and requests that the Subpoenas be quashed, or in the alternative, that Randy Allen be granted a protective order.

II. ARGUMENT AND AUTHORITIES

A. Applicable Rules of Civil Procedure

Rule 45(c)(3)(A) governs motions to quash subpoenas and provides that “[o]n timely motion, the court by which a subpoena was issued **shall** quash or modify the subpoena if it ... (iv) subjects a person to undue burden.” Fed. R. Civ. P. 45(c)(3)(A)(iv) (emphasis added); 9

Moore's Federal Practice § 45.04[3][iv] (Mathew Bender 2006) ("If a subpoena subjects any person to an 'undue burden,' it must, on timely motion, be quashed or modified.").

The scope of discovery under a Rule 45 subpoena is the same as the scope of discovery under Rules 26(b) and 34. See, e.g., Goodyear Tire & Rubber Co. v. Kirk's Tire & Auto Serv., 211 F.R.D. 658, 662 (D. Kan. 2003) (citing 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 2459 at p. 42 (2d ed. 1995)).

Rule 26(b)(1) governs the scope of a discovery request and provides that "parties may obtain discovery regarding any manner, not privileged, which is relevant to the subject matter involved. The information sought need not be admissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

Rule 26(b)(2) sets forth limitations on discovery. This section provides that the court may limit discovery if:

- (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from another source that is more convenient, less burdensome or less expensive;
- (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2).

Fed. R. Civ. P. 34(b) (emphasis added).

Courts considering objections to document subpoenas, either in the context of the proponent's motion to compel, or the respondent's motion to quash, apply this or a similar test in determining what constitutes an undue burden:

Whether a burdensome subpoena is reasonable must be determined according to the facts of the case, such as the party's need for the documents and the nature and importance of the litigation. To determine whether the subpoena presents an undue burden, we consider the following factors: (1) relevance of the information requested; (2) the need of the party for the documents; (3) the breadth of the document request; (4) the time period covered by the request; (5) the particularity with which the party describes the requested documents; and (6) the burden imposed. **Further, if the person to whom the document request is made is a non-party, the court may also consider the expense and inconvenience to the non-party. A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad.** Generally, modification of a subpoena is preferable to quashing it outright. [Emphasis added] [Internal quotations and citations omitted].

Wiwa v. Royal Dutch Petroleum Co., 392 F.3d 812, 818 (5th Cir. 2004); see also American Elec. Power Co. v. United States, 191 F.R.D. 132, 136 (S.D. Ohio 1999); Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44, 53 (S.D.N.Y. 1996); Goodyear Tire & Rubber Co., 211 F.R.D. at 662 (applying a similar test).

Determining what constitutes an unduly burdensome subpoena is a matter of discretion for the court. Concord Boat Corp., 169 F.R.D. at 49; Jones v Hirschfield, 219 F.R.D. 71, 74 (S.D.N.Y. 2003). The burden of proving that a subpoena is unduly burdensome is on the party requesting relief. Id. However, “concern for the unwanted burden thrust upon non-parties is a factor entitled to **special weight** in evaluating the balance of competing needs.” Cusumano v. Microsoft Corp., 162 F. 3d 708, 717 (1st Cir. 1998) (emphasis added); see also Goodyear Tire & Rubber Co., 211 F.R.D. at 662 (stating that “the status of a person as a non-party is a factor that weighs against disclosure”).

B. These Subpoenas are not Reasonably Calculated to Lead to Admissible Evidence

In this Court's October 4, 2006 *OPINION AND ORDER* (Document 932), the Court denied Plaintiff's motion to compel production of documents from the *City of Tulsa v. Tyson Foods, Inc.* lawsuit. As the Court pointed out on Page 3 of its opinion:

"Although Plaintiffs do identify some surface similarities between the *City of Tulsa* action and the currently pending case, such similarities are not enough to require a *carte blanche* production of all documents from the *City of Tulsa* action. The two lawsuits involve two separate watersheds, different water bodies, and different poultry farms located on separate watersheds. Plaintiffs provide no explanation for seeking the depositions and documents in an action which dealt with a different watershed and different water bodies."

Randy Allen, the target of the subpoenas which are the subject of this motion to quash, is a farmer with poultry growing operations in the Eucha Watershed -- not the Illinois River Watershed. (See Affidavit of Randy Allen, attached as Exhibit 1) In the subpoena, Plaintiffs have not provided any explanation for seeking the documents requested. Accordingly, for precisely the reasons eloquently stated by the Court, discovery from Randy Allen is not obviously relevant and, from Mr. Allen's perspective, is not reasonably calculated to lead to admissible evidence.¹ The subpoena should be quashed.

C. These Subpoenas are Facially Overbroad and Therefore Unduly Burdensome

Plaintiff's request for production of documents for inspection consists of more than three pages of document requests. The documents requested cover far more than just the documents that Randy Allen is required by the State of Oklahoma to maintain as a registered poultry grower. The documents requested seek to inquire into privileged personal information as well as information that may be protected for varying reasons. The nub of the matter is that the request is simply unduly burdensome for a non-party.

¹ Almost one-third of the sheer described items requested by Plaintiffs appear to be documents that are available to Plaintiffs from other and better sources, i.e. the parties to the *City of Tulsa* law suit or others associated with that action.

A subpoena on its face that is facially overbroad constitutes an undue burden under Rule 45(c)(3)(A)(iv). See Williams v. City of Dallas, 178 F.R.D. 103, 109 (N.D. Tex. 1998); Linder v. Calero-Portocarrero, 180 F.R.D. 168, 174 (D.D.C. 1998) (“Undue burden can be found when a subpoena is facially overbroad.”). In the Williams case, the court required modification of a subpoena that was overbroad on its face and thus, unduly burdensome under Rule 45(c)(3)(A)(iv), where the request did not specify a reasonable time as required by Rule 34(b). Id. at 110. See also Amcast Indus. Corp. v. Detrex Corp., 138 F.R.D. 115, 121 (N.D. Ind. 1991) (holding that a document request that was unlimited as to time frame “fell far short of fulfilling the requirement in Rule 34(b) that each item or category of document be described with reasonable particularity”).

Randy Allen’s poultry growing operations are in a particularly vulnerable point, due to the arrival of chicks on October 5, 2006. (See Affidavit of Randy Allen, attached as Exhibit 1) As a result, the burden of the document request, as well as the time required to prepare for and attend the proposed deposition, is an excessive burden to Mr. Allen.

For all of the reasons previously stated, the subpoena should be quashed.

III. CONCLUSION

For the reasons stated above, Randy Allen requests that the Court quash the Subpoenas issued on September 27, 2006 or, alternatively, issue a protective order directing that the Plaintiffs’ proposed discovery activities be stayed until such time as the Plaintiffs have demonstrated relevance and that the discovery is reasonably calculated to lead to admissible evidence. Further and in the alternative, Randy Allen would ask that the protective order extend the time period within which Mr. Allen may make specific objections or seek a protective order, if Mr. Allen is forced to marshal the documents necessary to respond to the overbroad subpoena. As currently propounded, the documents requested give rise to concerns that trade secrets or

otherwise privileged documents may be requested. As part of this alternate request for relief, Randy Allen reserves the right to make objections and assert applicable privileges should the Court deny his motion to quash.

Respectfully submitted,

s/ D. Kenyon Williams, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October, 2006, a copy of the above and foregoing was mailed via facsimile to the following counsel of record:

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